STATE OF MICHIGAN

COURT OF APPEALS

KELLI BALL RAKOZY,

Plaintiff-Appellant,

v

ADVANCE PRINT & GRAPHICS, INC, and GARY M. HAMBELL,

Defendants-Appellees.

UNPUBLISHED
November 29, 2011

No. 300880
Washtenaw Circuit Court
LC No. 10-000394-CZ

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order granting summary disposition to defendants with regard to plaintiff's action alleging defendants violated the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*., by refusing to hire or interview her because of her hearing disability. Because plaintiff did not create a material fact dispute that an open, available job or position existed "that is unrelated to [plaintiff's] ability to perform the duties of [the] particular job or position," MCL 37.1202(1)(a), the trial court properly granted defendants summary disposition. *Peden v Detroit*, 470 Mich 195, 198, 222; 680 NW2d 857 (2004). Accordingly, we affirm the trial court's order.

I. SUMMARY OF FACTS & PROCEEDINGS

Defendant Advance Print & Graphic, Inc. (APG), is a small firm owned and managed by its president and sole shareholder, defendant Gary M. Hambell (Hambell). APG employed a staff of two junior level graphics designers and provided printing services to various businesses. APG's largest client was Borders Bookstore in Ann Arbor. In 2008, APG added another large client, Roger Penske. Hambell wanted to transition the business to digital printing and expand its product line to offer Internet-based printing services. To facilitate growing the business, Hambell envisioned the creation of a new position of senior graphics designer to supervise the junior staff, develop new product lines, and train APG's clients in their use.

Hambell interviewed three candidates in June and July 2008, including plaintiff, for the potential position of senior graphics designer that he envisioned creating. On June 25, 2008, on the basis of plaintiff's resume he had acquired in some manner, Hambell emailed plaintiff: "I have reviewed your resume and may have an opportunity in our graphics department. Please call me to set up an interview." Plaintiff did not call but responded by email, and after further

emails, an interview was scheduled for the next day. Plaintiff did not inform Hambell that she was deaf and may need an interpreter. Hambell terminated the interview when he could not understand plaintiff's effort to verbally communicate with him. Hambell prepared a written memorandum of the interview, which reads as follows:

> To: File
> Regarding: Interview with Kelli Rakozy
>
> This afternoon I interviewed Kelli Rakozy. I noticed that when we met in the lobby that she had a hearing disability. This was never disclosed prior to our interview
> nonetheless, I proceeded to interview Kelli.
>
> Due to her disability I had to end the interview because of my inability to be able to verbally understand her in any way. I told her that this position required face to face verbal discussions with our clients, and that since I was having trouble communicating with her, that our clients may have similar problems.
>
> I ended the interview.
>
> She became very upset and said that she was going to sue the company.
>
> If Kelli had revealed that she had a disability I would have made plans to have a sign language representative or another means of communication available so that the Interview could have been completed.
>
> Her aggressive and punitive personality would not have made her a good choice for a graphic designer in a short-run commercial print environment.

It is not disputed that the senior graphics designer position that Hambell envisioned was never filled. Because of a dramatic decrease in APG's business in the second half of 2008, the idea of creating the new position was abandoned. Not only did new business with the Penske account fail to develop as hoped, but business from Borders fell precipitously as well. In addition, there was no increased productivity from new software. Hambell testified that with respect to the anticipated new business, "that volume didn't come and, unfortunately, the software program wasn't what we thought it was going to be, and at that time the project went cold." In addition to abandoning the idea of the proposed new position, the economic downturn also resulted in the laying off of two existing APG staff (not the junior graphics designers).

Plaintiff filed her complaint in April 2010 alleging defendants violated the PWDCRA by "discriminatorily refus[ing] to interview and/or hire [plaintiff] for the position in APG's graphic design department because she is deaf." After discovery,[1] defendants moved for summary

[1] A hearing impaired interpreter was required for plaintiff's deposition, and the reporter deemed unintelligible more than one hundred of plaintiff's verbal responses.

disposition contending under the undisputed facts plaintiff could not establish a prima facie case of discrimination because of a disability. On October 13, 2010, the trial court heard the parties' arguments and ruled from the bench. The court's order was entered the same day granting defendants' motion for summary disposition "for the reasons stated on the record."

At the motion hearing, the trial court stated that defendants argued that plaintiff could not succeed on her PWDCRA claim because she interviewed for a mere employment opportunity or a potential position, not an actual, open and vacant position. The Court noted that plaintiff tacitly agreed, based on her statement that defendant set up the interview "'because he believed that her qualifications would fit a potential position.'" The court agreed with defendants' position, observing that plaintiff made no argument, nor cited any law to the contrary.

The trial court stated the elements of plaintiff's PWDCRA claim and discussed the evidence that plaintiff submitted to establish her prima facie case, opining:

> In an effort to establish that her hearing disability is not related to her ability to perform the duties of graphic designer—of the graphic designer position at issue, Plaintiff offers affidavits and other documentary evidence demonstrating she is well-qualified and capable of performing the job duties of graphic design work. Under MCL 37.1103[d](i)(a), the duties of a particular job are not determined solely by reference to the employer's definition of the job. [Citing *Ankerson v MK-Ferguson Co*, 191 Mich App 129, 140; 477 NW2d 465 (1991).] However, Plaintiff must submit proof that her disability is unrelated to the essential duties of this particular job. [Citing *Koester v Novi*, 213 Mich App 653, 661-662; 540 NW2d 765 (1995), aff'd in part and rev in part on other grounds 458 Mich 1 (1998).]
>
> Here, the job description does not contradict Defendants' assertion that Plaintiff's disability is not unrelated to the particular job opportunity at issue. The evidence submitted by Defendant shows that quote, "strong, verbal communication skills," unquote, are an essential and central element of this particular employment opportunity. The job description provides that the candidate quote, "should be prepared to meet and/or call customers at any time," unquote, and quote, "is a central communication point," unquote to ensure the delivery of high quality product.

The trial court then summarized its ruling granting summary disposition to defendants:

> The Court finds no genuine issue here for a jury to decide. The undisputed facts show that this incident was related to an exploration of a job opportunity, that there was not a quote, "posted, open and available position," unquote, that Plaintiff's disability was not unrelated to the job opportunity as determined in accordance with Defendants' properly applied business judgment and that Plaintiff has failed to refute Defendants' legitimate, non-discriminatory business reason—a significant decrease in business—as the reasons for Defendants' decision to discontinue the job opportunity. Because Plaintiff has

failed to show a *prima facie* case of employment discrimination, for the reasons stated by Defendant, Defendants' Motion is granted.

Plaintiff now appeals by right.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Peden*, 470 Mich at 200-201. A motion brought under MCR 2.116(C)(10) tests the factual support of a claim. When the evidence viewed in a light most favorable to the nonmoving party discloses that there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law, the trial court may grant summary disposition. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

III. ANALYSIS

The framework of the PWDCRA with respect to plaintiff's claim provides:

(1) Except as otherwise required by federal law, an employer shall not:

> (a) Fail or refuse to hire, recruit, or promote an individual because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position. [MCL 37.1202(1)(a).]

The PWDCRA defines "disability" and "unrelated" as follows:

(d) Except as provided under subdivision (f),[2] "disability" means 1 or more of the following:

> (i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
>
> > (A) For purposes of article 2, substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.
>
> * * *

[2] This subsection, which relates to disabilities caused by use of alcohol or controlled substances, is not relevant to this case.

> (l) "Unrelated to the individual's ability" means, with or without accommodation, an individual's disability does not prevent the individual from doing 1 or more of the following:
>
> > (i) For purposes of article 2, performing the duties of a particular job or position. [MCL 37.1103(d)(i)(A) and (l)(i).]

Although plaintiff's complaint alleges defendants refused to "hire" or "interview" her because she is deaf, she now argues defendants failed to "recruit" her because of her disability. MCL 37.1202(1)(a). The undisputed evidence shows that defendants recruited and interviewed plaintiff for the possible position of senior graphics designer. Plaintiff does not seriously dispute legitimate business reasons resulted in the potential position's not being created or filled. Instead, she contends defendants terminated their recruitment of her before that decision was made.

> To establish a prima facie case of discrimination under the statute, a plaintiff must show that (1) [she] is 'disabled' as defined by the statute, (2) the disability is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute. [*Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999).]

The first of the trial court's reasons for granting defendants summary disposition was the court's ruling that there must be an open and available "particular job or position" to support an actionable claim of discrimination because of a disability under § 1202(1)(a) and that the undisputed evidence showed the position at issue was never more than a possible position to be created in the future. Defendant supports this ruling by noting that Michigan employs the burden-shifting analysis adopted in *McDonnell Douglas v Green*, 411 US 792; 36 L Ed 2d 668; 93 S Ct 1817 (1973), in civil rights actions under Michigan law. See *Hazle*, 464 Mich at 462-463. Further, because Michigan's civil rights statutes are similar to their federal counterparts, federal precedent is persuasive authority, but not necessarily binding. *Peden*, 470 Mich at 219; *Chiles*, 238 Mich App at 472-473. In order to establish a prima facie case of discrimination under the *McDonnell Douglas* framework, a plaintiff must show "(i) that he belongs to [the protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 US at 802. Defendant also relies on *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 252; 101 S Ct 1089; 67 L Ed 2d 207 (1981)(emphasis added), in which the Court opined in order for a plaintiff to establish a prima facie case of disparate treatment she must prove "that she applied for an *available position* for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."

As in the trial court, plaintiff presents no argument or authority to dispute defendants' argument that for liability under § 1202(1)(a) that there must be an actual, open and vacant job or position. This alone is usually enough to preclude appellate relief. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this

Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Moreover, the plain language of the statute precludes discriminatory actions only with respect to "a particular job or position." MCL 37.1202(1)(a). This language clearly implies that the prohibited discriminatory conduct must relate to an existing open and available job or position. But the statute also prohibits discrimination in recruiting for "a particular job or position." Consequently, we assume without deciding that the protection of § 1202(1)(a) with respect to recruitment extends, as here, to recruitment for a potential position to be created in the future.

The second reason the trial court granted summary disposition to defendants was that plaintiff failed to create a material fact dispute that her disability was "unrelated to [her] ability to perform the duties of a particular job or position." MCL 37.1202(1)(a). In this regard, although plaintiff's disability is deafness, the job criterion at issue is the ability to effectively communicate verbally, and plaintiff has a speech disability. The APG graphic designer job description provides: "Qualified candidates must possess excellent written and verbal skills and should be prepared to meet and/or call customers at any time. The position is a central communication point between our customers and our production staff to ensure we deliver high quality materials." Both Hambell and APG's human resources/business manager, Sheila Worton, testified in their depositions that the contemplated position required effective communications skills with staff and customers. Plaintiff presented direct evidence that defendants terminated their recruitment of plaintiff for the potential position at issue because of her poor verbal skills. In Hambell's own words:

> Due to her disability I had to end the interview because of my inability to be able to verbally understand her in any way. I told her that this position required face to face verbal discussions with our clients, and that since I was having trouble communicating with her, that our clients may have similar problems.

The plain language of the statute covers only disabilities that are unrelated to a plaintiff's ability to perform the duties of the position at issue. See *Carr v General Motors Corp*, 425 Mich 313, 321-322; 389 NW2d 686 (1986). After the *Carr* decision, the statute was amended in 1990 to define "unrelated to the individual's ability" to mean "with or without accommodation, an individual's disability does not prevent the individual from . . . performing the duties of a particular job or position." MCL 37.1103(l)(i). An employer's duty to accommodate a person with a disability is limited, however, to "(1) the alteration of physical structures to allow access to the place of employment, and (2) modification of peripheral duties to allow job performance." *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 29-32, n 2; 580 NW2d 397 (1998), citing and adopting the holding of *Rancour v Detroit Edison Co*, 150 Mich App 276, 287; 388 NW2d 336 (1986). Also, the duty to accommodate does not extend to a new job placement or creation of a new job. *Tranker v Figgie (On Remand)*, 231 Mich App 115, 124; 585 NW2d 337 (1998).

Plaintiff argues that she created a material fact question on this issue because she presented evidence that she could perform some functions of a graphic designer. Also, plaintiff presented evidence that she had worked diligently to develop her verbal communications skills. But the trial court did not err by concluding this evidence was insufficient to create a material fact dispute that plaintiff could satisfy the strong verbal communications skills that defendants' evidence established was an essential qualification for the senior graphics designer position Hambell envisioned creating.

Plaintiff also argues that as a matter of law defendants may not impose a job qualification that matches a person's disability. Citing *Means v Jowa Security Services*, 176 Mich App 466; 440 NW2d 23 (1989), plaintiff asserts "a company cannot hide behind a job description that automatically precludes employment of an individual with a particular handicap." And, she argues, a job description that would prevent employment of one "with a speech or hearing disability . . . is unlawful." We disagree.

In *Means*, the plaintiff filed an action alleging a violation of § 1202(1)(a) after a security firm refused to hire the plaintiff who was otherwise qualified because he refused to meet a job description requiring that candidates be clean-shaven. The plaintiff contended that because he was required to maintain a beard to treat a skin condition, and he was otherwise well-qualified for the position, an exception to the job description for him should be made. A jury found in plaintiff's favor, and the defendant appealed. This Court affirmed, reasoning that because "reasonable minds could find that plaintiff was fully able to perform the duties of the job with a beard, the question of whether defendant had a handicap unrelated to the job was properly submitted to the jury." *Means*, 176 Mich App at 473. The Court also specifically held "that an employer may not make the absence of a particular handicap part of the job description, make compliance with the job description a qualification for employment, and then use the qualification as a basis for denying employment to one who has that handicap." *Id*. at 474.

We decline to extend the *Means* holding to its logical conclusion as plaintiff espouses. First, *Means* was decided before November 1, 1990, and although it has precedential effect, MCR 7.215(C)(2), it is not binding on subsequent panels of this Court, MCR 7.215(J)(1). *Superior Hotels, LLC v Mackinaw Twp*, 282 Mich App 621, 641; 765 NW2d 31 (2009). Second, nothing in the Handicappers' Civil Rights Act[3] at the time *Means* was decided required employers to accommodate the qualifications for a particular job to a person's disability. The plain language of the statute extends its protection only to handicaps or disabilities that are "unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(a). "[T]he only handicaps covered by the act, for purposes of employment, are those unrelated to ability to perform the duties of the position." *Carr*, 425 Mich at 321-322. The 1990 amendment requiring an employer to accommodate a person with a disability applies only to "peripheral duties" of a job. MCL 37.1103(l)(i); *Rourk*, 458 Mich 29-32, n 2. Third, our Supreme Court subsequently held that under the PWDCRA, the employer's own judgment about the duties of a job position will not always be dispositive, but it is always entitled to substantial deference. *Peden*, 470 Mich at 218. The discussion in *Peden* is instructive and supports our decision rejecting plaintiff's argument that defendants may not lawfully require strong verbal communication skills as a requisite qualification for its proposed position of senior graphics designer.

[3] In 1998, the Legislature amended the name of the "Handicappers' Civil Rights Act" to the "Persons With Disabilities Civil Rights Act," and substituted the word "disability" for the word "handicap" throughout the act. 1998 PA 20; *Peden*, 470 Mich at 203.

First, the Court observed that the statute does not provide specific guidance regarding the phrase "the duties of a particular job or position." *Peden*, 470 Mich at 217. Further, "something more than silence is required . . . to warrant redefining the role of the employer in determining the scope of job positions within its purview." *Id*. Thus, "in the absence of any contrary indication, . . . the customary responsibilities of the employer in defining the scope of job positions are unaffected by the act and that the judgment of the employer in terms of such scope is entitled to substantial deference by the courts under the PWDCRA." *Id*. at 217-218. Additionally, as an antidiscrimination statute, the PWDCRA is not "designed to regulate, or to set governmental standards for, particular employment positions. Nor is it a statute designed to enable judges to second-guess, or to improve upon, the business judgments of employers." *Id*. at 218. Consequently, "the judgment of the employer regarding the duties of a given job position is entitled to substantial deference." *Id*.

In this case, in the exercise of its business judgment, defendants determined that strong verbal communications skills were required to meet the duties of a possible new position of senior graphics designer, which duties included supervision of staff, developing new product lines, and face-to-face interaction with APG's clients. Plaintiff failed to produce evidence to overcome the substantial deference due defendants in the exercise of their business judgment regarding "the duties of a particular job or position." MCL 37.1202(1)(a); *Peden*, 470 Mich at 217-219. We therefore conclude that the trial court correctly ruled that plaintiff failed to produce sufficient evidence for reasonable minds to differ whether plaintiff's disability was unrelated to the job opportunity as determined in accordance with defendants' properly applied business judgment. *Id*.; *Chiles Shop, Inc*, 238 Mich App at 473; *Koester*, 213 Mich App at 661-662. The trial court did not err by granting defendants summary disposition. *Peden*, 470 Mich at 222.

Based on the foregoing analysis it is unnecessary to address defendant's legitimate business reasons for discontinuing its exploration of creating a new position.

We affirm. As the prevailing party defendants may tax costs under MCR 7.219.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey